No. 86-341

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

FORT HALIFAX PACKING COMPANY, INC.
Appellant

—v.—

P. DANIEL COYNE, Director Bureau of Labor Standards, Department of Labor
Appellee

and

FORT HALIFAX PACKING COMPANY, INC.
Appellant

—v.—

RAYMOND BOURGOIN, *et al.*
Appellees

ON APPEAL FROM THE MAINE SUPREME JUDICIAL COURT

APPELLANT'S REPLY BRIEF

JOHN C. YAVIS, JR.
(Counsel of Record)

THOMAS M. CLOHERTY
BARRY J. WATERS
THOMAS J. JOYCE
MURTHA, CULLINA, RICHTER and PINNEY
CityPlace—P.O. Box 3197
Hartford, Connecticut 06103-0197
Telephone (203) 240-6000

Appellant's Attorneys

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Legislative Materials:

Other Authority:

ARGUMENT

1. ERISA Preempts the Maine Severance Pay Statute.

A. The Maine Law Relates To Employee Benefit Plans.

As recited in appellant's principal brief, ERISA preempts all state laws that have "a connection with or reference to" employee benefit plans. *See Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97-98 (1983). There is no dispute here that severance pay is an "employee benefit" within ERISA's contemplation. Nor can it be questioned that the Maine severance pay statute requires certain employers to distribute this ERISA benefit according to a "plan": either by statutory formula or by privately-established substitute. Thus, ERISA preemption of the Maine severance pay statute is manifest and elementary.

Maine attempts to save its statute from preemption by arguing that it does not conflict with the substantive purposes of ERISA, such as preventing abuses in privately-administered plans. *See, e.g.*, Brief of Appellee at 11. Maine's narrow conception of ERISA's reach is erroneous. ERISA displaces all state laws that relate to employee benefit plans, "even including state laws that are consistent with ERISA's substantive requirements." *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985). This broad preemption policy is designed to preclude litigation over the validity of state action arguably impinging upon Federal regulation and to prevent a multiplicity of conflicting state laws dealing with some aspect of welfare benefit plans—even if the state law is "not clearly connected to the Federal regulatory scheme." 120 Cong. Rec. 29,942 (1974), *quoted in Shaw*, 463 U.S. at 99 n.20.

In addition to misstating Congressional intent, Maine distorts the statutory language. For example, Maine argues that there is no basis for finding preemption here because "the Maine severance pay statute does not relate to any existing ERISA-covered plan *in this case*." Brief of Appellee at 11 (emphasis added). But ERISA preempts "any and all State laws insofar

as they may now *or hereafter* relate to *any* employee benefit plan." 29 U.S.C. § 1144, ERISA Section 514 (emphasis added).

ERISA's preemption of a particular state statute, then, is not decided selectively on a case-by-case basis, measuring each employer's existing plan against the statute. Rather, the statute is void insofar as it relates to *any* employer's employee benefit plan—currently maintained or "hereafter" established in compliance with the state statute. Thus, in *Standard Oil Co. of California* v. *Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981), ERISA preempted the Hawaii statute not only "insofar as" it applied to plaintiff Standard Oil Company's employee benefit plan but "insofar as" it attempted to impose certain health benefits on employers—both those employers whose existing employee benefit plans would have been "altered or affected" and those who had no plans but who would be required to establish and maintain "plans envisioned by the Hawaii statute." 633 F.2d at 764.

Maine also argues that "the Maine statute does not require employers to maintain any plan because it expressly defers to any private severance pay agreement that may be reached between employer and employee." Brief of Appellee at 11. But, in fact, the statute does require employers to maintain a severance pay plan. They must "voluntarily" establish and maintain a plan or they must maintain the state-mandated plan. In either event, they must "maintain" an ERISA employee benefit plan. As *Agsalud* holds, ERISA forbids such state regulation.

Maine's alternative assertion that the connection between the Maine statute and ERISA plans is too remote or tenuous to justify preemption is frivolous. *Compare Gilbert* v. *Burlington Industries, Inc.*, 765 F.2d 320, 327 (2d Cir. 1985), *aff'd mem.*, 106 S. Ct. 3267 (1986) (state law regulating payment of severance benefits is not remote or tenuous) and *Stone & Webster Engineering Corp.* v. *Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982), *aff'd mem.*, 463 U.S. 1220 (1983) (state law man-

dating continuation of benefits to employees receiving workers' compensation is not remote or tenuous) *with Rebaldo* v. *Cuomo*, 749 F.2d 133, 138 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2702 (1985) (state regulation of private payor hospital rates too remote or tenuous to justify preemption) and *American Telephone & Telegraph* v. *Merry*, 592 F.2d 118, 121 (2d Cir. 1979) (garnishment of benefit plan income to enforce alimony and support orders too remote or tenuous to justify preemption).

Contrary to Maine's and the amici's suggestions, this case is not fundamentally different from *Agsalud*. A state may not impose an employee benefit plan upon employers. Because of the nature of the particular benefit involved in *Agsalud*, employers were required to attend to certain administrative details in maintaining the mandated plans. It is immaterial that similar administrative details are not required under the Maine statute. Severence pay is a benefit that, by its very nature, may not require extensive plan administration; it is quite often a one-time, lump sum payment. Nevertheless, where—as here—all of the incidents of a "plan" can be identified (*Donovan* v. *Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc)), and that "plan" is mandated by state law (*Standard Oil Co. of California* v. *Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981)), ERISA preemption is implicated. There is no support for Maine's statement that no ERISA plan exists because there is no trust providing an "ongoing benefit program." Brief of Appellee at 20-21. An ongoing program is not an essential plan element. *See Gilbert* v. *Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd mem.*, 106 S. Ct. 3267 (1986); *Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *aff'd mem., sub nom., Brooks* v. *Burlington Industries, Inc.*, 106 S. Ct. 3267 (1986).

The AFL-CIO concedes that *Donovan* correctly identifies the "basic attributes" of an ERISA plan and that the Maine statute expresses all of those attributes. Brief for AFL-CIO at 9. However, the AFL-CIO contends that the statutory "phrase 'estab-

lished or maintained by an employer' requires quite clearly that it is the *employer*, and not some third party, governmental or otherwise, that must subscribe to that scheme, and define its parameters." *Id.* at 11. *Agsalud* defies this statement. States may not "define the parameters" of a plan and then require employers to "subscribe" to it. Moreover, contrary to the assertion of Maine and the Employment Law Center, the severance pay statute does not create a state "administered" benefit. Other than creating the statutory benefit formula, Maine does not administer the severance benefit. Thus, in the ordinary case an employer that closes or relocates a covered establishment would be required to provide its employees a predetermined amount of severance pay, either in accordance with a private formula or the statutory formula, with no state involvement whatsoever. It is only when an employer does not provide severance benefits, either because it challenges the statute or because it lacks the necessary assets, that the state may *elect* to become involved.

Maine argues that preemption should not be found in this case because it would allow employers "who have no pension plan or employee benefit plan" to "take advantage of ERISA preemption to escape its obligations under the Maine severance pay law." Brief of Appellee at 26. This is a curious policy argument that begs the issue. ERISA precludes states from imposing an "obligation" on employers whether they have an existing plan or not. *See Standard Oil Co. of California* v. *Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981). Congress determined that states would not have authority to regulate in the field of employee benefit plans.

Maine also suggests that ERISA does not preempt state statutes with an otherwise valid purpose. Thus, Maine contradicts the severance pay statute's plain purpose in arguing that the severance pay statute is "not intended to regulate employee benefits *per se*." Brief of Appellee at 28. Apparently, Maine suggests that the regulation imposed upon employers is appropriate because it is not regulation for regulation's sake, but in-

stead, "it constitutes Maine's attempt to respond to the specific problem of plant closings." *Id.* This state-police-power purpose does not save the Maine statute from ERISA preemption, any more than it saved the statutes in *Shaw* and *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). *See also Gilbert*, 765 F.2d at 327.

Finally, Maine states that Congress intended to regulate employee benefit plans, not employee benefits themselves. Brief of Appellee at 12. This is precisely the point addressed in Appellant's principal brief at 16-17. States may not mandate ERISA benefits. Congress left that decision in the hands of industry and labor. *Cf.* 120 Cong. Rec. 3981 (1974), "Employee Benefit Security Act of 1974; Material Explaining H.R. 12906 Together with Supplemental Views. To Accompany H.R. 2.", *reprinted in* Senate Committee on Labor and Public Welfare, *Legislative History of the Employee Retirement Income Security Act of 1974* ("Legis. Hist.") (1976) at 3305 ("fundamental aspect of present law" is voluntary establishment of retirement plans).[1]

B. The Maine Severance Pay Statute Is Not An "Unemployment Compensation Law".

Section 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3), provides that Subchapter I of the act is inapplicable to employee benefit plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment

[1]The amicus brief of The Employment Law Center contains a number of broad policy statements concerning the alleged impact, both nationally and in Maine, of plant closures. The statistical "facts" cited by amicus in support of these policy positions are not found in the record of this case. Furthermore, they are of questionable validity. For example, one cannot assume that the Maine law eases employment problems. The obligation created under the statute may well serve to discourage businesses from locating new business in Maine or from purchasing marginal operations in Maine. Moreover, whatever the merits of amicus' policy arguments, they do not override Congress' preemptive intent here.

compensation or disability insurance laws." Under ERISA Section 514(a), 29 U.S.C. § 1144, preemption does not apply to state laws that relate to plans exempt under Section 4(b)(3). Maine and its supporting *amici* assert that the severance pay statute constitutes an unemployment compensation law under Section 4(b)(3). Consequently, they argue that, since the severance plan imposed on Fort Halifax was maintained solely to comply with this law, the plan is exempt from Subchapter I of ERISA and the Maine statute is not preempted. This argument finds no support in ERISA's language, structure or legislative history.

i. ERISA's Language Specifically Distinguishes The Terms "Severance Pay Or Benefits" And "Unemployment Compensation Law".

This Court has recently stated: "In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress. Federal law may supersede state law in several different ways. First, when acting within constitutional limits. Congress is empowered to pre-empt state laws by so stating in express terms." *California Federal Savings & Loan Association* v. *Guerra*, 107 S. Ct. 683, 689 (1987) (citations omitted). Congress expressly included severance pay plans within ERISA's coverage. Section 3(1)(B) of ERISA, 29 U.S.C. § 1002(1)(B), includes benefits described in 29 U.S.C. 186(c) which in turn includes "severance or similar benefits". Section 3(2)(B), 29 U.S.C. § 1002(2)(B) authorizes the Secretary of Labor to issue regulations concerning "severance pay arrangements." It is inconceivable that Congress, after specifically including severance pay arrangements within ERISA's coverage in Sections 3(1)(B) and 3(2)(B) also meant to exclude severance pay by a reference to "unemployment compensation laws" in Section 4(b)(3). By the express language in ERISA, Congress considered "severance pay" to be different from "unemployment compensation laws."

ii. The State Of Maine Itself Considers The Severance Pay Law Not To Be Part Of Its Unemployment Compensation Law.

Maine, like every other state, has an unemployment compensation law. Maine's law, specifically entitled "Unemployment Compensation," was enacted pursuant to Title IX of the Social Security Act of 1935 and the Federal Unemployment Tax Act and is found in Chapter 13 of Title 26, Maine Revised Statutes. 26 M.R.S.A. § 1041 *et seq*. Under this law, an "Unemployment Compensation Fund", 26 M.R.S.A. § 1141, is created for the purpose of providing benefits to eligible "unemployed" individuals. 26 M.R.S.A. § 1192, 26 M.R.S.A. § 1043(17). In contrast, the Maine statute at issue in this case is entitled "Severance Pay", and is found in Subchapter II ("Wages and Medium of Payment") of Chapter 7 ("Employment Practices") of Title 26. If Maine had intended the law to constitute an "unemployment compensation law", one would expect to find it in the appropriate section of the Maine Revised Statutes. *Cf. Stone & Webster Engineering Corp.* v. *Ilsley*, 518 F. Supp. 1297, 1302 (D. Conn. 1981), *aff'd*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem.*, 463 U.S. 1220 (1983) (law located in general labor chapter was not a workmen's compensation law).

The reason the severance pay statute is not located within Maine's unemployment compensation laws is obvious; the statute does not link the severance pay obligation to unemployment. In fact, the words "unemployed" or "unemployment" cannot be found in the statute. Thus, an individual would receive the same severance benefit whether unemployed or not.

The fallacy of calling the severance pay law part of Maine's unemployment compensation law is further demonstrated by an analysis of the interaction of the two statutes. First, contrary to the disingenuous legislative history argument of the Maine Attorney General (Brief of Appellee at 31) and the assumption of the Employment Law Center (Brief for Employment Law

Center at 16 n.9), the Maine law does not disqualify an individual from receiving unemployment compensation benefits for each week of severance pay received. As Maine concedes (Brief of Appellee at 31 n.23), the Maine Bureau of Employment Security only disqualifies individuals during the specific week they actually receive severance pay. This result is mandated by an analysis of the unemployment compensation law's plain language. *See* 26 M.R.S.A. § 1043(17), 26 M.R.S.A. § 1043(19), 26 M.R.S.A. § 1193(5)(A). The Maine severance pay formula mandates the payment of all severance pay within one pay period after the employee's termination. 26 M.R.S.A. § 625-B(2). Therefore, the employee is ineligible for unemployment compensation only for that one week when the severance pay is provided, regardless of the amount. Clearly, severance pay under the Maine statute is not a substitute for unemployment compensation.

In addition, the Maine unemployment compensation law deals with the individual unemployed as a result of a plant shutdown. It provides that such an individual may be eligible for dislocated worker benefits while attending retraining programs (26 M.R.S.A. § 1191(4)(A), § 1196(1)(B)) and for extended unemployment compensation benefits. 26 M.R.S.A. § 1195. Thus, the argument that the severance pay statute is Maine's method of dealing with unemployment caused by plant shutdowns is misleading.

iii. The Term "Unemployment Compensation Law" Should Be Given Its Ordinary, Common-sense Meaning.

Despite the obvious conclusion that the severance pay statute is not part of Maine's unemployment compensation law, Maine and its supporting *amici* raise a number of arguments in their attempt to avoid preemption. The thrust of each argument is that Congress intended the term "unemployment compensation law" in section 4(b)(3) to encompass a wide range of state

laws as long as they have some connection with the possibility of unemployment. These arguments are all unpersuasive.

The term "unemployment compensation law" has an accepted, plain meaning. It is a law enacted pursuant to Title IX of the Social Security Act of 1935 and the Federal Unemployment Tax Act to provide benefits during periods of unemployment. This Court has consistently used the term "unemployment compensation law" when discussing laws under those statutes. *See, e.g., Wimberly* v. *Labor & Industry Council of Missouri*, 107 S. Ct. 821 (1987); *New York Telephone Company* v. *New York Labor Dept.*, 440 U.S. 519, 541 (1979) (plurality opinion); *Id.* at 557 & n.8 (Powell, J. dissenting); *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 482-88 (1977); *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 364 (1951). In fact, those statutes themselves refer to state "unemployment compensation laws" and set forth the criteria for approval of those laws. 42 U.S.C. § 501-504; 26 U.S.C. § 3301-3311.

There is no evidence that in referring to unemployment compensation laws in Section 4(b)(3) Congress intended to apply the term in other than its traditional, common-sense manner. There certainly is no evidence to suggest that Congress intended to give the term the radical meaning suggested by Maine.[2] In the absence of such evidence, it must be assumed that Congress intended to use the ordinary meaning. *See, e.g., Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982). In fact, those federal courts discussing the term have considered it to

[2]As reported on and passed, both the House and Senate versions of ERISA exempted "workmen's compensation laws or unemployment compensation disability insurance laws." H.R. 2, 93d Cong., 1st Sess., § 101(b)(2) (1973), Legis Hist. at 2259; H.R. 2, 93d Cong., 2d Sess., § 101(b)(3) (1974), Legis. Hist. at 3918; S. 4, 93d Cong., 1st Sess., § 503 (1973), Legis. Hist. at 547-48; H.R. 4200, 93d Cong., 1st Sess., § 502(g)-(j) (1973), Legis. Hist. at 2032. In Conference the "or" between

(Footnote continued on following page)

apply in its traditional sense to state laws enacted as part of the Social Security system. *See Delta Air Lines* v. *Kramarsky*, 650 F.2d 1287, 1305 (2d Cir. 1981), *aff'd in part, rev'd in part sub nom. Shaw* v. *Delta Air Lines*, 463 U.S. 85 (1983); *Agsalud*, 633 F.2d at 764-65.

The AFL-CIO argues that Congress could not have intended the term "unemployment compensation law" to refer to laws enacted as part of the Social Security system because ERISA would not apply to plans created under these laws in the first instance. However, as the Second Circuit suggested in *Delta*, the conclusion that such plans would fall outside ERISA is not as clear as the AFL-CIO suggests. 650 F.2d at 1306. This would be particularly true for those employers that self-fund rather than contribute on a tax basis. *See, e.g.*, 26 M.R.S.A. § 1221(10). Thus, an exclusion for traditional unemployment compensation laws would not be redundant.

Citing *Metropolitan*, Maine and Employment Law Center argue that the term should be construed to encompass other types of laws in order to encourage state experimentation with novel forms of "unemployment compensation." *Metropolitan* is inapposite. First, the argument distorts the meaning of unemployment compensation instead of offering a broad defini-

(Footnote continued from previous page)

unemployment compensation and disability laws was inserted. H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., § 4(b)(3) (1974), Legis. Hist. at 4291. This was done without explanation and without any indication that a change had been made. *Id.* at 255-56, 261, 296, 383, Legis. Hist. at 4522-23, 4530, 4563, 4650. It is worth noting, however, that the House Report to the original H.R. 2 and its substitute, H.R. 12906, both indicated that the change was intended by the House from the start. H.R. Rep. No. 533, 93d Cong., 1st Sess., 18 (1973), Legis. Hist. at 2365; 120 Cong. Rec. 3979 (1974), "Employee Benefit Security Act of 1974: Material Explaining H.R. 12906 Together with Supplemental Views. To Accompany H.R. 2.", Legis. Hist. at 3297. Given the absence of any discussion on the subject, the legislative history lends no support to the attempt of Maine and its supporting amici to alter the plain meaning of the term "unemployment compensation law."

tion. Second, *Metropolitan* interpreted section 514(b)(2), which provides an *exception* to ERISA *preemption*. Section 4(b)(3) involves an *exemption* from ERISA *coverage*. The implications of broadly construing exemptions from coverage are fundamentally different than the implications of broadly construing exceptions to preemption. Third, because there was no evidence suggesting that Congress intended otherwise, this Court provided the terms in Section 514(b)(2) their "common-sense" definition. *Metropolitan*, 471 U.S. at 739-47. Similarly, given the absence of evidence to suggest Congress intended otherwise, the terms in Section 4(b)(3) should be accorded their common-sense definition, which definition would not encompass the Maine law. *Id.*; *see also Shaw*, 463 U.S. at 96-97 (term "relate to" given "normal sense" meaning). Finally, the argument that broad State experimentation should be allowed in the employee benefit area was squarely and appropriately rejected by the Court of Appeals in *Agsalud*. 633 F.2d at 765.

iv. The Term "Benefit In The Event Of . . . Unemployment" Is Not Synonymous With The Term "Unemployment Compensation Law".

In their attempt to broaden the definition of unemployment compensation laws, Maine and, to a greater extent, *amici* Employment Law Center and AFL-CIO also rely on the definition of employee welfare benefit plan in Section 3(1). They argue that since severance pay may be a "benefit provided in the event of . . . unemployment" under Section 3(1)(A), it should be deemed to be an "unemployment compensation law" under Section 4(b)(3). The AFL-CIO bolsters its argument for a broad definition by relying on legislative history to the Welfare and Pension Plan Disclosure Act ("WPPDA"). AFL-CIO Brief at 18.

These arguments are faulty for a number of reasons. First, the language in the two provisions is clearly different: "benefits in the event of unemployment" is a broad term with no ac-

cepted meaning; as shown above, "unemployment compensation law" is a specific term with an accepted meaning. In addition, the term "benefit in the event of unemployment" is located in Section 3, which defines plans *included* within ERISA's coverage. The term unemployment compensation law is in Section 4, which defines plans *excluded* from ERISA's coverage. These different terms, which perform fundamentally different functions in the same statute, should not be construed to be synonymous.

More importantly, a construction along the lines suggested by Maine would read Section 3(1)(B) out of the statute. Plans providing severance benefits are included within ERISA both as plans providing benefits in the event of unemployment under Section 3(1)(A) and as plans providing "severance benefits" under Section 3(1)(B). *See, e.g., Holland*, 772 F.2d at 1145; *Gilbert*, 765 F.2d at 325-26; *see also* 29 C.F.R. § 2510.3-1. Under the argument put forth by Maine, Congress intended to equate "benefits in the event of unemployment" with "unemployment compensation law." If this argument is correct, Congress would also have had to intend to include "severance benefits" within the definition of "unemployment compensation." Such a distortion of terms with accepted meanings cannot be presumed, and, given the complete absence of statutory language or legislative history to support it, this argument is pure presumption. *Cf. Metropolitan*, 471 U.S. at 742 (construction of statutory term that would violate plain meaning of language and render terms redundant "has little to recommend it").

The more elaborate argument of the AFL-CIO is ultimately just as unconvincing. For, while the AFL-CIO goes to great lengths to construct legislative history supporting a broad definition of the term "benefit in the event of unemployment" in Section 3(1)(A), it is unable to find any support whatsoever for attributing this broad definition to the term "unemployment compensation law" in Section 4(b)(3).

v. Conclusion.

In ERISA Congress used both the term "severance pay" and the term "unemployment compensation law". It must be presumed that Congress recognized that these terms have different meanings. For the last fifty years the term "unemployment compensation law" has had a specific, accepted meaning. There is no evidence to suggest that Congress did not intend to use that meaning in Section 4(b)(3). Nor is there any evidence to suggest that Congress meant to alter the term so radically as to encompass compensation to persons who are not deemed unemployed under a state's unemployment compensation law. Thus, the Maine statute, which is specifically entitled "Severance Pay", which is located outside the "Unemployment Compensation" Chapter of Title 26 of the Maine Revised Statutes and which is not directly linked in any way to unemployment, is not an unemployment compensation law within the meaning of ERISA Section 4(b)(3).

2. The NLRA Preempts the Maine Severance Pay Statute.

The parties to this appeal agree that the proper interpretation of *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724 (1985), controls the NLRA preemption aspect of this case. Fort Halifax reads *Metropolitan* as an exceptional case in the long line of *Machinists* NLRA preemption cases, turning principally upon the following factors: i) the Massachusetts statute established a *minimum* standard; ii) the state imposed the standard upon insurers rather than directly upon employers; iii) all employers could avoid the standard by declining to offer insurance coverage or by self-insuring; and iv) the statute involved insurance, a traditional bastion of state regulation. The State of Maine, on the other hand, reads *Metropolitan* not as an exception but as the case that swallows the *Machinists* rule.

The fundamental and critical distinction between this case and *Metropolitan* is that the Maine statute does not establish the requisite minimum standard that saved the Massachusetts statute. Even the appellee concedes that employers may contract to provide less than the benefit provided in the statute. *See* Brief of Appellee at 36. Nonunion employers, naturally, may do so unilaterally. Union employers, however, must get an agreement from the union. This feature provides unions with a bargaining chip and interferes with the bargaining process. Moreover, as the AFL-CIO concedes, after discharging its statutory duty to bargain in good faith, an employer is free under the NLRA to resort to the economic weapon of unilateral implementation of terms and conditions of employment. In Maine, however, the employer does not regain this right with respect to severance pay. Thus, unlike the statute in *Metropolitan*, which did not interfere in the bargaining process because it affected both union and nonunion employers equally, the Maine statute enhances the union's bargaining power and restricts the employer's right to use economic weapons.[3] *Metropolitan* does not sanction this interference with Federal labor law principles, and, for the reasons stated in appellant's principal brief, the NLRA preempts the Maine statute.

---

[3]The argument by the AFL-CIO that this scenario is "impossible to imagine" is frivolous. As the AFL-CIO should be aware, severance pay issues do not only arise prior to an imminent shutdown. As its own brief illustrates, these issues are frequently negotiated by ongoing companies. This is particularly true of multi-state employers desiring a uniform benefit package, either including or excluding severance pay.

CONCLUSION

For the foregoing reasons, and the reasons stated in appellant's principal brief, we respectfully request that the Court reverse the judgment of the Maine Supreme Judicial Court.

JOHN C. YAVIS, JR.
THOMAS M. CLOHERTY
BARRY J. WATERS
THOMAS J. JOYCE

All of:

MURTHA, CULLINA, RICHTER and PINNEY
CityPlace—P.O. Box 3197
Hartford, Connecticut 06103-0197
Telephone: (203) 240-6000

Attorneys for Appellant